No. 02-16997-FF

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INTERNATIONAL AIRCRAFT RECOVERY, L.L.C.,
a Nevada Limited Liability Company,
Plaintiff-Counter-Defendant-Appellant

v.

THE UNIDENTIFIED, WRECKED AND ABANDONED AIRCRAFT,
her armament, apparel, and cargo located within one marine league
of a point located at 25º43'34" N Latitude and 80º2'8" W Longitude,
Defendant-Appellee

UNITED STATES OF AMERICA,
Intervenor-Counter-Claimant-Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF INTERVENOR-COUNTER-CLAIMANT-DEFENDANT-APPELLEE UNITED STATES OF AMERICA

PETER D. KEISLER
Assistant Attorney General

MARCOS D. JIMENEZ
United States Attorney

DEBRA J. KOSSOW
Assistant Director, Admiralty

DAMON C. MILLER
GREGG A. CERVI
Attorneys
Torts Branch, Civil Division
U.S. Department of Justice
Post Office Box 14271
Washington, DC 20044-4271
Telephone: (202) 616-4047
Facsimile: (202) 616-4159

CERTIFICATE OF INTERESTED PERSONS STATEMENT

The undersigned counsel of record certifies, pursuant to Rule 26.1-1 of the Rules of this Court, that the following persons have an interest in this case:

The Honorable James Lawrence King, Senior United States District Judge, for the Southern District of Florida, Miami, FL;

The Honorable John J. O'Sullivan, United States Magistrate Judge for the Southern District of Florida, Miami, FL;

Douglas Champlin, President, International Aircraft Recovery, L.L.C., Key West, FL;

David Paul Horan, Esq., Attorney for Appellant, Key West, FL;

International Aircraft Recovery, L.L.C., a Nevada Limited Liability Co.;

Members of the U.S. Department of Justice as follows:

Robert J. Bondi, Esq., Attorney for Appellee, Miami, FL;

Gregg A. Cervi. Esq., Attorney for Appellee, Washington, D.C.;

The Honorable Marcos D. Jimenez, U. S. Attorney, Miami, FL;

Peter D. Keisler, Esq., Assistant Attorney General, Washington, D.C.;

Debra J. Kossow, Esq., Assistant Director, Washington, D.C.

Damon C. Miller, Esq., Attorney for Appellee, Washington, D.C.;

National Museum of Naval Aviation, Pensacola, FL;

Naval Historical Center, Washington, DC

STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument in this case. Pursuant to 11th Cir. R. 34-3(b), the United States believes that the dispositive issues have been authoritatively decided, or that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Nevertheless, the United States stands ready to present oral argument, if desired by the Court.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. app. § 742 (Suits in Admiralty Act). This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

I. Whether the district court properly concluded, on remand, that there is no genuine dispute as to any material fact, that the United States rejected salvage of the TBD aircraft in February 1991, and that Plaintiff/Appellant, IAR, is not entitled to any salvage award.

STATEMENT OF THE CASE

This case concerns the attempt of a potential salvor, International Aircraft Recovery, L.L.C. ("IAR"), to obtain an award from the United States for salvage services allegedly rendered to a sunken, World War II-era Navy "Devastator" TBD-1 airplane ("TBD") owned by the United States, after the United States had put the salvor on written notice that it rejected such services.

In July, 1998, IAR filed this in rem action, seeking an injunction from interference with its salvage rights, and a salvage award or title under the "American Law of Finds" (Complaint, R-1-1). In an attempt to effect in rem arrest of the aircraft, IAR recovered a radio mast from the wreck site and had it delivered

to the Marshal under a "Warrant for Arrest" (R-1-6; R-1-9; R-1-10; R-1-16; R-1-17; R-1-23).

The United States intervened and sought to vacate the arrest and enjoin any further salvage (R-1-12). The United States also filed a claim to the in rem defendant and answered the Complaint (R-1-21; R-1-22). The parties cross-moved for summary judgment (R-1-19, R-1-20), and on July 8, 1999, the district court ruled that plaintiff had an ongoing salvage right and that the United States, even if it were the owner, could not reject plaintiff's salvage services (R-1-32 at 16-19). The district court deferred determination of a salvage award (R-1-32 at 21). It entered final judgment for IAR (R-1-33).

On July 17, 2000, this Court reversed and remanded, International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft, 218 F.3d 1255 (11th Cir. 2000), cert. denied, 531 U.S. 1144 (2001) (R-2-65). This Court ruled that the government remained the owner of the aircraft and that, as owner, it could reject salvage services. It ruled that the owner did not have to act as a "prudent person", id. at 1261-2, and did not have to make alternative provisions for recovery, id. The Court remanded "for the district court to consider when the United States effectively rejected the salvage efforts of IAR and its predecessors-

in-interest, and to calculate a salvage award, if appropriate, for their past efforts." Id. at 1263.

On remand, the United States filed a motion for summary judgment (R-3-99), which was granted by the district court on August 22, 2002 (R-5-148), and judgment was entered for the government (R-5-147). The district court found that there was no dispute as to the material fact that the government had put the salvor on notice in February, 1991, that any salvage of the aircraft "without the express written permission of the Department of the Navy" was unauthorized, and that the salvor had stipulated that it never had a salvage agreement with the Navy (R-5-148 at 3-4, as amended, R-5-154). Since plaintiff did not conduct its first salvage operation until December, 1994, the district court ruled that he was entitled to no salvage award (R-5-148 at 4). IAR's Motion for Rehearing (R-5-151) was denied on November 25, 2002 (R-5-162), and this appeal was filed December 24, 2002 (R-5-163).

STATEMENT OF THE FACTS

Most of the relevant facts of this case were set forth in the previous ruling of this Court, 218 F.3d at 1256-58. Those facts are summarized herein and supplemented by additional facts from the record, all of which are undisputed (except where a disagreement is noted).

Plaintiff/appellant, International Aircraft Recovery, L.L.C. ["IAR"], is a Limited Liability Company whose president is Douglas Champlin ["Champlin"]. During the period under discussion, Champlin also did business through other corporate entities, including Windward Aviation, Inc. and Champlin Fighter Museum, Inc. Champlin has been in the business of acquiring and restoring military airplanes since approximately 1970 (Champlin dep. at 9).[1]

In late 1990, Robert Cervoni of Scientific Search Associates, a group of salvors unconnected with Champlin or any of his companies, located a sunken historic Navy "Devastator" TBD-1 aircraft ["TBD"] in the Atlantic Ocean off the coast of Florida, about eight miles east of Miami. The aircraft had crashed during a training flight in that location in 1943. The finders videotaped the wreck and offered to sell the video and the location of the plane to the National Museum of Naval Aviation ["Museum"] in Pensacola, Florida for $25,000. The Museum declined, because it did not have a budget for new acquisitions (218 F.3d at 1257; Rasmussen dep. 9-10; Champlin dep. 13-14).

On February 8, 1991, Capt. Robert Rasmussen, director of the Museum, wrote to Mr. Cervoni, the discoverer of the plane (Rasmussen dep. 116-17; R-3-99,

[1] The deposition of Douglas Champlin was entered into evidence as an exhibit to the transcript of the hearing of June 14, 1999 (R-7, Exhibit 10).

Ex. B)[**App. 1**].[2] In that letter, Capt. Rasmussen advised Mr. Cervoni that the Navy owns the TBD, and that:

> The Department of the Navy, and its Museum, have not given anyone the authority, either expressly or impliedly, to extract from the Atlantic Ocean, part or all of the TBD Devastator. Any attempt at so salvaging the TBD, without the express written permission of the Department of the Navy, through its Museum, will result in a recommendation from this office to institute whatever action is appropriate to prevent an unauthorized taking.

Id. After the Museum discovered that Champlin was also interested in recovering the TBD, Capt. Rasmussen forwarded a copy of the February 8, 1991 letter to Champlin on February 20, 1991 (Rasmussen dep. 116-17; Champlin dep. 46-51); R-3-99, Ex. C)**[App. 2]**. At that time, Champlin did not know the location of the TBD (Champlin dep. 49, lines 3-4).

In April 1991, Champlin purchased the coordinates and the Cervoni video tape for $75,000. Champlin also entered into an agreement with Wreck Finders, a salvage company, to salvage the TBD (Champlin dep. 35-7). Then began a long series of negotiations between the Museum and Champlin over a possible agreement to salvage the TBD.

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[2] Throughout, the term "Ex. ___" refers to the Exhibit designation in the original document, in this case, the Motion for Summary Judgment, filed at R-3-99. The most important of these documents are reproduced in the attached Appendix and labeled sequentially as **"App. ___"**

At that time, the Navy could acquire salvage and restoration services for historic aircraft through the exchange of excess aircraft and components with civilians for such services (Rasmussen aff., R-1-20, Ex. 1). This exchange program was governed by statute, 10 U.S.C. § 2572(b), and by Secretary of the Navy ["SECNAV"] Instruction 5755.2 (1989) (R-3-99, Ex. Q)**[App. 3]**. The SECNAV Instruction required approval at the Secretary's level for exchange proposals, but delegated this responsibility to the Assistant Secretary of the Navy (Shipbuilding and Logistics) (Id. at ¶ 3(a)). As of March 8, 1995, this delegation was changed to the Assistant Secretary of the Navy (Research, Development, and Acquisition (ASN(RD&A)) (R-3-99, Ex. R. ¶ 6). The entire instruction was later superseded by SECNAV Instruction 5755.2A (1999) (R-3-99, Ex. R).

In December 1991, Champlin proposed an exchange of two surplus Navy "F4F" aircraft as a trade for his salvage services (R-3-99, Ex. G)**[App. 4]**. Capt. Rasmussen rejected this request as too expensive, but proposed to trade one "F4F" for the services (R-3-99, Ex H)**[App. 5]**. At that time, Capt. Rasmussen cautioned:

> [T]his aircraft still constitutes U.S. Navy property and if disturbed or recovered the Department of Justice will intervene and parties indeed will have to make amends to the federal government. . . .
>
> [P]lease understand that I do not have the authority to effect this proposal without approval from the Secretary of the Navy. Such approval will be sought immediately once we reach agreement on this project. (Id.)

In April 1992, Champlin discussed the status of his negotiations with the Navy in a letter to his general contractor, Ted Darcy (R-3-99, Ex. I)**[App. 6]**. In the letter, Champlin admonished Mr. Darcy about discussing the TBD project with the press, stating: "Any publicity at this point disturbs me as we have no deal with the Navy" (Id.) In May 1992, the Museum again proposed to Champlin in writing, to exchange one "F4F" for salvage services (R-3-99, Ex. E)**[App. 7]**. Champlin was asked to forward a letter of acceptance "which is required by SECNAV as part of the exchange process" (Id.). No acceptance was received.

In an effort to negotiate a more favorable agreement, Champlin retained Mikesh & Associates in September 1992, to negotiate with the Navy (Champlin dep. at 98-9; R-3-99, Ex. J)**[App. 8]**. These efforts ended in 1993 with no agreement (Champlin dep. at 100).

In May 1993, Champlin's counsel, Milan G. W. Slahor, wrote to Dr. John Bernard Murphy, the Navy's Federal Preservation Officer, in an effort to obtain his assistance in authorizing the recovery of the TBD "for the benefit of all parties concerned," (R-3-99, Ex. K, p. 2)**[App. 9]**. After acknowledging that his client made no claim to the aircraft, he stated that "my client seeks to recover the TBD for the benefit of the Navy as a one-of-a-kind example of an important era in Naval Aviation" (Id.).

Dr. Murphy wrote back in June, 1993 (R-1-12, Ex. 7)**[App. 10]**, stating that the "crux of the problem" is a disagreement over the proposed trade arrangements, and that the Navy would be "derelict in its duties" if it authorized recovery without "a defensible conservation plan, funding, and facility for conserving and restoring this very fragile aircraft." The letter further advised:

> . . .[O]n the advice of the Navy Admiralty Counsel, your client does not have permission to salve the wreck. An individual who undertakes to intrude upon or remove this aircraft will be subject to criminal prosecution and civil action by the U.S. government. (Id.)

In August 1994, after hearing that another company might be interested in salvaging the TBD, Champlin, through his company Windward Aviation, Inc., after consulting with his own attorneys (R-1-10, Ex B, p. 3), filed suit in rem in the U.S. District Court for the Southern District of Florida, Windward Aviation, Inc. et al. v. The Unidentified, Wrecked and Abandoned Aircraft, et al. Case No. 94-1775-CIV-UNGARO-BENAGES). The amended complaint deleted a request for title under the "Law of Finds", and sought "possession", exclusive salvage rights, and a salvage award (R-1-12, Ex. 2, 3).[3]

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[3] The salvor's attorney stated in a "Notice of Filing Amended Complaint in Rem" that his client's intent "has never been. . .to assert a title superior to that of the Navy under the 'Law of Finds', etc. (R-1-12, Ex. 2, p. 5).

In December 1994, Champlin recovered a portion of the plane's canopy and filmed the wreck site (218 F.3d at 1257, R-1-12, Ex. 3, ¶ 7). He claims he did this on the verbal advice of Museum Deputy Director Robert ("Buddy") Macon, in order to prove the existence and condition of the aircraft and to secure his rights against other salvors (Champlin dep. 120-2; R-1-12, Ex. 2 at 4).[4] In February and March, 1995, the Department of Justice wrote two letters to Champlin, reminding him that title to the aircraft remained with the Navy, which had not authorized his salvage efforts (R-1-18, Exh. C and E)**[App. 11, App. 12]**. The letters demanded dismissal of the suit and return of the canopy. In response, Champlin's attorney disclaimed any intent to seek title and expressed hope for a future agreement on recovery (R-1-18, Ex. F)**[App. 13]**. The suit was subsequently dismissed voluntarily and the canopy turned over to the Museum. (Id.)

Negotiations continued, resulting in a tentative proposal. However, on July 10, 1995, Champlin wrote to the Museum that he was "surprised to learn. . .that the recovery of the TBD is still being considered by you for September," adding that he had been advised by Capt. Rasmussen that no proposal could be executed until

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[4] Macon testified that he did not authorize or give permission for the recovery of any part of the TBD (Macon dep. at 111-12). Although Macon was a law school graduate and had passed the Alabama bar, he had never practiced law, except as a labor relations specialist in the Navy (Macon dep. at 6). As previously stated, Champlin also consulted with his own attorneys before filing suit (R-1-18, Ex. B, p. 3).

"official written Navy approval is received and the elements of the proposal are properly entered into a legally binding contract" (Champlin dep. at 141; R-3-99, Ex. M)**[App. 14]**. A few weeks later, he suggested that the parties proceed to the "next step, i.e., contract to recover" (R-3-99, Ex. N)**[App. 15]**.

Subsequently, the Naval Historical Center ("NHC"),[5] as part of the review process, raised questions about the adequacy of Champlin's proposed salvage plan, and sent a series of questions to Champlin's salvage consultant for review (Champlin dep. at 142-9; R-3-99, Ex. O)**[App. 16]**. Neither Champlin nor his consultant responded to the NHC's questions. Rather, in August 1995, Champlin requested a change in the terms of the trade agreement, allegedly because of the added cost to address these concerns (Champlin dep at 146-53; R-3-99, Ex. P) **[App. 17]**. When an agreement could not be worked out, Champlin advised the Museum in August 1995 that he would withdraw from the project (Champlin dep. 152).

Three years later, in July 1998, Champlin filed this in rem action through IAR, seeking an injunction from interference with his salvage rights, and a salvage award or title under the "Law of Finds" (Complaint, R-1-1). At some time between

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[5] The SECNAV Instruction, R-3-99, Ex. Q, ¶ 4(c)**[App. 3]**, and other instructions, required coordination with the Curator of the Navy, who at the time was Dr. William S. Dudley, Director of the Naval Historical Center (Dudley Affidavit, R-1-20, Ex. 1, ¶ 1).

September 18 and November 2, 1998, Champlin visited the site, made another videotape, and recovered a radio mast from the wreck site (R-1-9; R-1-10). On November 17, 1998, Dr. William S. Dudley, Director of Naval History, wrote to Champlin, expressly prohibiting any attempt to salvage (R-1-12, Ex. 6) **[App. 18]**.

No salvage contract was ever entered into between the Navy and Champlin. In fact, Champlin, through counsel, stipulated to this on the record on two occasions:

> We'll go ahead and have a stipulation for purposes of the record that there is not now nor has there ever been an agreement with the Navy that was executed or an enforceable agreement where one side or the other could not have backed out.

Champlin dep. at 82; see also 102.

STANDARD OF REVIEW

The standard of review of a grant of summary judgment is *de novo*. Gibson v. Resolution Trust Corp., 51 F.3d 1016, 1020 (11th Cir. 1995).

SUMMARY OF ARGUMENT

In International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft, etc., 218 F.3d 1255 (11th Cir. 2000), cert. denied, 531 U.S. 1144 (2001), this Court held that the United States, as owner of the TBD, had the absolute right to refuse "voluntary" salvage of the aircraft, and remanded to the district court to determine two specific issues: (a) when the United States

"effectively rejected" salvage by IAR and its predecessors; and (b) the amount of a salvage award for IAR's past efforts, if appropriate. Id. at 1263-64.

The district court determined, on summary judgment, that IAR received a letter from the Navy, as early as February 1991, which rejected any salvage efforts undertaken without an agreement, in writing, with the Navy. No such agreement was ever reached. These facts are undisputed. Plaintiff did not conduct any salvage operations until well after the rejection date, therefore no salvage award was proper. The record shows that the district court correctly resolved the two issues which were remanded to it, and the judgment must therefore be affirmed.

IAR's position that salvage was verbally "authorized" by a lower-level Navy official is wrong on both the facts and the law. First, the Navy official in question never purported to enter into an agreement for payment of salvage. Second, the Navy repeatedly confirmed, in writing, its previous advice that legal action would be taken if salvage proceeded absent a written salvage agreement with the properly authorized officials. Third, verbal statements by unauthorized officials do not, as a matter of established law, bind the government.

While the government can be liable for maritime salvage, absent a contract, when its property is salved in exigent circumstances, such liability does not attach in the case of this historic aircraft which had been underwater for some 40 years

and the government expressly rejected its salvage. Further, as this Court suggested in its previous opinion, 218 F.3d at 1263, even if the government had not expressly rejected salvage, the doctrine of "constructive rejection" would apply, as there is no presumption (as there would be in the case of an operating ship or aircraft) that the Navy would desire salvage of this property.

Finally, IAR's efforts to draw the district court, and this Court, into a bitter and long-standing controversy over a transaction involving the exchange and sale of government-owned surplus C-130 aircraft is unavailing, as this controversy is not material to the issue of plaintiff's entitlement to any salvage award and is thus well beyond the issues that were remanded for determination.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THERE WERE NO GENUINE DISPUTES OF MATERIAL FACT ON THE REMANDED ISSUES OF "EFFECTIVE REJECTION" AND CALCULATION OF A SALVAGE AWARD, IF APPROPRIATE.

A. This Court's Remand Was Limited to the Issues of "Effective Rejection" and Calculation of a Salvage Award, if Appropriate.

(1) The District Court is Limited to a Consideration of the Remanded Issues.

The district court's role on remand is limited. Thus, "[a] district court when acting under an appellate court's mandate, 'cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even

for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.'" Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1510-11 (11th Cir. 1987) (en banc), quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895).

"Our settled circuit law obligates a district court to follow our mandates, . . . and not to assert jurisdiction over matters outside the scope of a limited mandate, which constitutes abuse of discretion [citations omitted]." United States v. Tamayo, 80 F.3d 1514, 1520 (11th Cir. 1996).

(2) Effective Rejection

The first issue remanded by this Court was "when the United States effectively rejected the salvage efforts of IAR and its predecessors-in-interest," 218 F.3d at 1263-4.

As shown in the factual summary herein, the record is replete with written admonitions to Champlin and his companies, beginning in 1991 and extending through the initiation of both lawsuits in 1994 and 1998, that not only is salvage not permitted, but that attempts at doing so will be met with legal action.

The very first communication, in any form, from the Navy to Champlin concerning the TBD, was the Museum's letter of February 20, 1991, forwarding its previous letter of February 8, 1991 to another salvor. That letter not only states

that no permission has been granted, but sets forth the manner in which any future permission must be obtained, i.e., "the express written permission of the Department of the Navy". This "express written permission" is totally absent from the record.[6]

After the Navy rejected IAR's "voluntary" salvage in 1991, the parties embarked on lengthy negotiations for a possible "exchange" agreement under 10 U.S.C. § 2572(b) and the implementing Navy instruction, which requires final approval at the Secretarial level. Under such an agreement, the Navy would have traded historic aircraft in its collection to Mr. Champlin's companies in exchange for his salvage services. But no such agreement was ever reached (Champlin dep. at 82 and 102).

(3) Appropriateness of a Salvage Award

The second issue remanded by this Court was the consideration of "a salvage award, if appropriate, for their [IAR its predecessors] past efforts," 218 F.3d at 1264 (emphasis added).

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[6] The Museum Director, Capt. Rusmussen, obviously was careful to require "express written permission" so that misunderstandings could not arise, as they apparently did in this case, from random telephone conversations with lower-level Navy employees, such as Buddy Macon, who were not authorized to bind the government.

Contrary to IAR's assertion at 12 of its Brief, this Court has not "already ruled on the issue of whether compensable voluntary salvage services were performed." Indeed, as pointed out in the very excerpt quoted by IAR:

> Whether IAR is eligible for a salvage award . . . depends on when the United States rejected the salvage efforts of Champlin and his companies.

218 F.3d at 1263. This Court clearly instructed the district court to determine when the government "effectively rejected" IAR's salvage services, and to calculate a salvage award for its "past efforts" only "if appropriate". 218 F.3d at 1264.

As shown above "effective rejection" clearly took place no later than February 20, 1991. Since no "salvage" took place until after that date, no salvage award is appropriate.

B. The Matters Raised by Appellant Are Not Material to the Remanded Issues.

(1) "Voluntary" Salvage Services Performed After Rejection Are Not Compensable.

IAR contends that it is entitled to a salvage award for "voluntary" salvage allegedly performed in response to verbal "encouragement" or "acquiescence" from a Museum employee after his services were specifically rejected in writing by the Museum Director and no salvage contract was in place.

It is well settled that a private party cannot establish a contractual relationship with the United States based upon dealings with anyone except a

contracting officer. "Contracts may be entered into and signed on behalf of the Government only by contracting officers," 48 C.F.R. § 1.601 (part of the Federal Acquisition Regulations). Further, those purporting to act for the government must have actual authority to do so. If they do not, then the government cannot be bound by their acts. Heckler v. Community Health Services, 467 U.S. 51 (1984); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592 (1923).

The Supreme Court, in Federal Crop Ins. Corp., established the bright line rule that it is up to the individual seeking to do business with the United States to ascertain specifically the scope of authority of the persons with whom he is dealing. This is so even though the agent purporting to act for the government may be unaware of the limitations on his own power. 332 U.S. at 384. The Federal Circuit noted the importance of this strict rule when it stated, "The United States Government employs over 3 million civilian employees. Clearly, federal expenditures would be wholly uncontrollable if Government employees could of their own volition, enter into contracts obliging the United States." City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990).

Nothing in the record indicates that Buddy Macon had any authority to enter into a salvage contract for the government, and he did not.[7] Furthermore, even under the version of the conversation testified to by Champlin, Macon did not purport to enter into a contract, or agree to pay for any services. No mention of payment was ever made. Nor was the requisite "written permission" to salvage, as required by Capt. Rasmussen's letter of February 8, 1991 (forwarded to Champlin on February 20, 1991) ever provided. At all steps of the negotiating process, Champlin knew that before he was authorized to proceed, he had to have a final salvage agreement, in writing, approved by the Secretary of the Navy. In fact, on several occasions, he was careful to point out this very fact to the Navy personnel with whom he was dealing.

Further, the Antideficiency Act, 31 U.S.C. § 1341, prohibits government officials and employees from making expenditures or incurring obligations in

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[7] If Champlin claimed that he had a contract, he would have been required to comply with the jurisdictional claim requirements of the Contract Disputes Act ["CDA"], 41 U.S.C. §§ 601-13, before pursuing his case in court. By its terms, the CDA applies to "any express or implied contract. . .entered into by an executive agency for. . .the procurement of services," 41 U.S.C. § 602(a)(2) [Emphasis added]. The failure to submit a claim in writing to the contracting officer on a government contract, which was denied, deprives the district court of subject matter jurisdiction. Bethlehem Steel Corp. v. Avondale Shipyards, Inc., 951 F.2d 92 (5th Cir. 1992).

excess of available appropriations or in advance of those appropriations. Cessna Aircraft Co. v. Dalton, 126 F.3d 1442, 1448-9 (Fed. Cir. 1997).

Despite this lack of an approved contract for salvage, IAR claims it is entitled to an award for "voluntary" salvage performed after rejection. This Court has made it clear, however, that the Navy, as owner of the aircraft, had the absolute right to reject salvage.

Clearly, Champlin was trying to convince the Navy to enter into a salvage contract with IAR or its predecessors. In furtherance of that purpose, Champlin retrieved portions of the wreck (the canopy and radio mast) and videotaped the wreck, apparently to demonstrate the feasibility of salvage and to enhance his prospects of ultimately obtaining Navy approval. These activities were in furtherance of Champlin's own business purposes, to obtain a Navy contract for salvage, which he admits never materialized (Champlin dep. 82, 102).[8] As Champlin himself recognized, he took a gamble that he would be able to recover the TBD and exchange it with the Navy for surplus aircraft (Champlin dep. 43).

In short, IAR and its predecessors-in-interest cannot show that any of their salvage "services" were carried out with the approval of any individual authorized to commit appropriated funds, or to trade Navy assets in the form of planes,

[8] They were also in furtherance of his litigative purposes, to effect in rem "arrests" of the aircraft.

combat materiel, or any other items of value. None of Champlin's discussions with the Navy included any promises of payment even from an unauthorized individual, let alone someone with contracting authority. Plaintiff at no time had any legitimate expectation of payment for past salvage services, or any entitlement of future payment.

(2) The Doctrine of "Constructive Rejection" Applies to this Aircraft.

In its previous opinion in this case, this Court considered "the possibility that laws regulating the use of public property could provide a 'constructive rejection' of salvage of publicly owned vessels," 218 F.3d at 1263. In this case, since it is clear that the United States actually rejected IAR's salvage efforts before any salvage took place, this Court need not reach the issue of "constructive rejection".

"The law of salvage presumes that the owner desires the salvage service," R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 963 (4th Cir. 1999). But, this is not a case where a salvor has come upon an operating vessel or aircraft which is *in extremis* and in need of immediate assistance. This was a historic aircraft which had crashed in the Atlantic Ocean and had remained there for some 40 years before being located. Even in the absence of an affirmative rejection, it cannot be presumed that the government would want to salvage the plane.

The admiralty rules of salvage, which were historically developed for the purpose of rescuing operating craft and returning them to commercial service, are simply not applicable in "historic salvage" situations where "the owner of the property [the United States] may not even have desired for the property to be 'rescued.'" Klein v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir. 1985). See also Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953 (M.D. Fla. 1993).

According to Dr. William S. Dudley, the Director of the Naval Historical Center and Curator of the Navy, the TBD is a historic aircraft which is eligible for inclusion in the National Register of Historic Places under the criteria established pursuant to the National Historic Preservation Act of 1966 ["NHPA"], 16 U.S.C. §§ 470 et seq. (Dudley aff., R-1-20, Ex. 1 ¶ 10). Further, as of April 1999, some 3,500 shipwrecks and 5,500 plane wrecks were known to be owned by the U.S. Navy all over the world (Dudley dep. 100). The decision to recover or not recover these wrecks is often a thorny policy decision which is driven by the availability of funds for salvage and restoration services, as well as the need to ensure proper methods of recovery. See, Letter of Dr. J. Bernard Murphy of June 25, 1993 **[App. 10]**.

The NHPA does not mandate that the government undertake every possible historic salvage or preservation activity which might be urged upon it by interested parties, whether those parties are motivated by policy-based historic preservation goals, see National Trust for Historic Preservation et al. v. Blanck, 938 F.Supp. 908, 922 (D.D.C. 1996), aff'd, 203 F.3d 53 (D.C. Cir. 1999), or are simply trying to sell their salvage services. Such a mandate would be impossible to control fiscally, and would remove from the government a necessary policy judgment as to which of these activities to undertake and how best to perform them.[9] Thus even in the absence of an "effective rejection", it cannot be assumed that the Navy "desires" salvage or restoration services, or is even able or willing to pay for it. The doctrine of "constructive rejection" therefore necessarily applies to historic wrecks.

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[9] The NHPA requires that the Navy manage and maintain its historic artifacts "in a way that considers the preservation of their historic, archaeological, architectural, and cultural values", 16 U.S.C. § 470h-2(a)(2)(B) and to take into account the effect of any "undertaking" on such artifacts before approving or licensing same, 16 U.S.C. § 470(f). The NHPA thus does not allow private parties to engage in unauthorized salvage of federally owned historic property in a way that undermines the preservation policy of the responsible federal agency. In many cases, the preferred policy is simply to allow preservation *in situ*, see, Varmer, "Sunken Treasure: Law, Technology and Ethics": Third Session: Non-Salvor Interests: The Case Against the 'Salvage' of the Cultural Heritage, 30 J. Mar. L. & Com. 279 (1999).

(3) The Issue of the C-130 Exchange

IAR spends a great deal of time, as it did below, alleging fraud and illegality in a 1995 exchange under the "barter " statute, 10 U.S.C. § 2572(b), and the supporting Navy instruction, involving 11 C-130 aircraft. But IAR has failed to demonstrate how this exchange is material to the issue of a salvage award, which was the only issue remanded by the Court of Appeals. The district court properly found this issue to be irrelevant to the summary judgment motion (R-5-148 at 3), as indeed IAR had conceded in its Response below (R-3-102 at 6). Instead, the district court suggested that IAR pursue a separate action under existing fraud and contract statutes[10], noting that another decision in this Court had already addressed similar claims arising out of the same transaction (R-5-148 at 3).[11] Therefore, this Court need spend no more time on the issue.[12]

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[10] Such statutes include the False Claims Act ["FCA"], 31 U.S.C. §§ 3729-33, and the Contract Disputes Act ["CDA"], 41 U.S.C. §§ 601-13.

[11] The prior decision in this Court is United States ex rel. Stafford v. Naval Aviation Museum Foundation, Inc., No. 00-15892 (11th Cir., April 22, 2002, reh'g denied, June 19, 2002), a qui tam case under the FCA, which can be found at R-4-141. Claims arising out of the same transaction were also litigated in United States ex rel. Naval Aviation Museum Foundation v. Skinazi, No. 00-CV-511 (N.D. Fla., July 26, 2001), aff'd, No. 01-14882, 33 Fed.Appx. 994 (11th Cir., Feb. 25, 2002) and are presently being litigated in a CDA case, Airplane Sales International Corp. v. United States, 54 Fed.Cl. 418 (Fed. Cl. 2002).

[12] IAR's attorney made a number of quite unnecessary and unsubstantiated statements below accusing various government attorneys of fraud, obstruction of justice, and other "felonies", based on nothing more than their involvement in these lawsuits, including this one (R-3-107). He continues this theme in his briefing

On May 24, 1995, the Museum submitted to the Assistant Secretary of the Navy a proposal for exchange of eleven C-130 aircraft hulks located at an Arizona air force base. These eleven C-130s were valued by the Navy at $200,000. The exchange proposal would trade the eleven C-130s to the Naval Aviation Museum Foundation ["Foundation"] in exchange for $200,000 worth of services "in support of salvage, preservation and restoration" of the TBD-1 aircraft (R-4-116 at 4).[13]

Meanwhile, a company named Airplane Sales International ["ASI"], controlled by Maurice Skinazi, agreed to purchase the C-130s from the Foundation on an "as is, where is" basis for $200,000. This purchase contract was signed on April 17, 1995, but was contingent on Assistant Secretary approval of the transaction and of the Museum obtaining the C-130s from Navy inventories (R-4-116 at 6, Ex. 3).

On November 27, 1995, after Assistant Secretary approval, the government contracted with the Foundation, exchanging eleven C-130s for $200,000 worth of services to preserve and restore the TBD (R-4-116 at 6-7, Ex. 4). On November

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before this Court (Appellant's Brief at 22). The U.S. Magistrate below found these allegations to be baseless (R-4-126). The district judge did not disturb the Magistrate's findings (R-5-149).

[13] Although the summary of the transaction indicated it was for "support of salvage", the $200,000 was not intended to cover the actual salvage of the TBD aircraft (R-4-116 at 4-5 and Ex. 2). Rather, this transaction was to ensure that funds would be available for post-salvage preservation and some restoration of the TBD after it was pulled from the ocean (Id.).

30, 1975, the Museum transferred ownership of the C-130s to the Foundation. Thereafter, ASI paid the Foundation $200,000 for the C-130s (R-4-116 at 7, Ex. 5 & 6).

This transaction has been the subject of extensive investigatory, media, and court challenges, looking into the question of whether $200,000 was a "fair" price for the government to receive for the C-130s.

Whatever the merits of this dispute, IAR has not shown how it is related to its claim for a salvage award. Neither Champlin nor IAR, nor any other of Champlin's companies, was a party to any of the contracts involved in the C-130 exchange. The C-130 trade was not intended to raise money for IAR's salvage services. If Champlin believes, as a private citizen, that fraud occurred and must be uncovered, his remedy is a qui tam suit under the FCA, or by presenting his case to the U.S. Attorney. The C-130 exchange was not mentioned in the Complaint or Amended Complaint for good reason–it has nothing to do with this litigation. It is merely an after-thought in a desperate attempt to be reimbursed by the government for a failed contract negotiation.

If IAR's view of salvage law were correct, then any would-be salvor whose services were rejected could drag the owner into court to "explain" his rejection of

salvage.[14] If the court did not approve of the reason, the owner would be forced to allow the salvage, or pay the salvor the value of what he has "salved", contrary to the owner's instructions. But this Court, in its previous ruling, did not hold that the Navy had to have a good reason, a bad reason, or any reason at all, to reject salvage of its property. This Court rejected the notion that the owner's decision to reject must be "prudent" or that the owner must have made other arrangements to "save" his vessel. 218 F.3d at 1261-2. It also rejected plaintiff's argument that "public policy" overrode the owner's rights. Id. at 1262, n. 17. Clearly, the C-130 exchange matter has no relevance to any claim by IAR for a salvage award.

CONCLUSION

For the foregoing reasons, there is no genuine issue as to any fact which is material to the issues remanded by this Court. The judgment of the district court is correct, and should be affirmed.

Dated: August ___, 2003.

Respectfully Submitted,

PETER D. KEISLER
Assistant Attorney General

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[14] It should be noted that the rejection of IAR's salvage services was made in 1991–well before any of the events related to the C-130s. The subsequent contract negotiations never resulted in an agreement, for the reason, as explained above, that the parties disagreed on the terms of the proposed exchange.

MARCOS D. JIMENEZ
United States Attorney

DEBRA J. KOSSOW
Assistant Director

DAMON C. MILLER
GREGG A. CERVI
Attorneys
U.S. Department of Justice
Post Office Box 14271 (mail)
Washington, D.C. 20044-4271
1425 New York Ave., NW #10100 (courier)
Washington, DC 20005
Telephone (202) 616-4047
Facsimile (202) 616-4159
Counsel for the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true copies of the foregoing Appellee's Brief were sent via United States Mail, postage prepaid, this ___ day of August, 2003, to the following counsel of record:

David Paul Horan
Horan, Horan & Wallace, L.L.P.
608 Whitehead Street
Key West, FL 33040-6549
(305) 294-4585

_____
DAMON C. MILLER